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No. 73-772

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

DALY AND OTHERS,

Petitioners,

vs.

NATURAL RESOURCES BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

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REPLY BRIEF IN SUPPORT OF PETITION

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In its response to the petition for certiorari, the respondent has asserted that the questions presented in the petition were neither raised in nor decided by the Wisconsin Supreme Court, and, that the only questions raised by the petitioners in the Wisconsin Supreme Court and decided by it were exclusively questions of state law.

Petitioners assert, however, that the federal questions presented in the petition were clearly raised and decided by the Wisconsin Supreme Court.

After noting the historical background of the instant case and the *Tomow*[1] case,[2] the Wisconsin Supreme Court discussed the nature of the dam application[3] and stated that:

> Those opposing the application for the permit challenged the ownership of the land affected (this issue has been resolved by *Tomow,* supra), its effect on other waters and riparian lands, its economic feasibility, its effect upon tribal hunting and fishing rights (citing "*Menominee Tribe* v. *United States,* (1968), 391 U.S. 404, 88 Sup. Ct. 1705, 20 L. Ed. 2d 697.) and its effect upon esthetic and ecological values.[4]

That Court also noted that although the petitioners are enrolled Menominee tribal members, they merely had the same rights in the issues presented by the case as any state citizen interested in protecting his public right to enjoy navigable streams for recreational purposes. However, it also noted that:

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[1] See petition for certiorari: Tomow v. MEI et al and N.E. Isaacson, No. 73-760.

[2] See Wisconsin Supreme Court decision in this case, Pet. App. p. 3-4.

[3] See Wisconsin Supreme Court decision in this case, Pet. App. pp. 5-7.

[4] See Wisconsin Supreme Court decision in this case, Pet. App. p. 7.

> As enrolled members of the Menominee Tribe they had an additional indirect right in the preservation of their hunting and fishing privileges. [5]

The Wisconsin Supreme Court also stated that:

> There is a contention that the notice provisions of Sec. 31.06, Stats., have not been complied with in that personal service of notice or notice by mail was not given to them or any of the 3,270 enrolled Menominees. In *Tomow, supra,* it was determined that title to land and the right to manage it and sell it was in MEI and the voting trust. The individually enrolled Menominees therefore did not have sufficient personal interest so as to entitle them to personal notice. Notice was published in the newspaper most likely to be seen by the residents of Menominee County. Without question, they did have actual notice, they did appear, and did participate. [6]

Thus, the Wisconsin Supreme Court clearly had before it the two issues which are the subjects of the federal questions raised in this petition: A. the petitioners' claim that the conveyance of tribal lands to Lakes of the Menominees violated their rights under federal law, and, therefore, that Court's ground of several findings essential to the granting of the permit solely on its findings as to those rights in the *Tomow* case also renders its decision here violative of petitioners' rights under federal law, and; B. the petitioners' claim that their treaty hunting and fishing rights were illegally abrogated and impaired by the respondent's order granting the dam construction permit.

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[5] See Wisconsin Supreme Court decision in this case, Pet. App. p. 10.

[6] See Wisconsin Supreme Court decision in this case, Pet. App. pp. 10-11.

A. The Legality of the Conveyance.

The Wisconsin Supreme Court's holding in this case regarding the ability of MEI to convey the lands affected by the dam to LOM rests entirely upon its findings in *Tomow* that petitioners and their fellow tribal members had no rights under the Menominee Termination Act and Plan to control conveyances of tribal lands to non-Menominee after Termination became effective in 1961.[7] In *Tomow*, that Court decided that 7 voting trustees and not the enrolled Menominee tribal members had the power under the Termination Act and Plan to approve such conveyances. In the instant case, that Court relied solely on that holding and held that the ownership statement required by § 31.05 (3), Wis. Statutes,[8] was properly met by the fact that MEI, with the approval of the voting trustees alone, had stated in the application that it was the owner of the land affected by the dam and that it could convey such land to the LOM joint venture.

The Wisconsin Supreme Court's holding as to the notice requirements of 31.06(2), Wisconsin Statutes, is also based solely on its finding in *Tomow* that the petitioners and their fellow tribal members did not retain any rights to approve conveyances of tribal lands to non-Menominee.[9] It is petitioners' position in the instant case, that the grounding by the Wisconsin Supreme Court of these two essential findings solely on that Court's erroneous holding in *Tomow*

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[7] See quotations, supra, and that Court's decision in Pet. App., pp. 7 and 10-11.

[8] § 31.05(2) is reproduced in Pet. App., p. 68.

[9] See quotations, supra, and that Court's decision in Pet. App., pp. 10-11.

regarding the petitioners rights concerning conveyances to non-Menominee, completely bypasses and negates petitioners rights under federal law, the Menominee Termination Act and Plan. If this Court grants a writ of certiorari in the *Tomow* case, see companion petition, No. 73-760, and reverses the Wisconsin Supreme Court as to the approval of land sales issue, the decision of that Court in the instant case which is so inextricably and necessarily intertwined with the holdings on the federal questions in the *Tomow* case, must also be overturned. It is for this reason that petitioners respectfully request this Court to grant certiorari on this issue.

B. Treaty Hunting and Fishing Rights.

In holding that the petitioners as enrolled members of the Menominee Tribe . . . had an additional indirect right in the preservation of their hunting and fishing privileges,[10] the Wisconsin Supreme Court cited *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404 (1968), wherein this Court reaffirmed the fact that only Congress may abrogate treaty rights and held that the Menominee Termination Act had not abrogated petitioners' rights to hunt and fish which were guaranteed them in the 1854 Treaty of Wolf River.[11] However, in reviewing the Circuit Court's opinion that this Treaty did not prevent the respondent from approving the transfer of the land to LOM and its flooding of the land, the Wisconsin Supreme Court chose to ignore these treaty rights, and, hence, abrogated them as to the tribal lands affected by the dam and its flowage. Its deci-

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[10] See quotation, supra, and that Court's decision in Pet. App. p. 10.

[11] Menominee Tribe of Indians v. U.S., 391 U.S. 404 (1968).

sion also impaired petitioners' treaty rights in the remainder of their tribal lands in that the swampy lands which are affected by the dam constituted an historically essential breeding grounds for game and fish populating the entire reservation. As noted in the petition, the swampy nature of the land was a primary reason for the tribe's selection of the land for its reservation in 1854. [12]

In summary, the Wisconsin Supreme Court's decision in the instant case bestowed upon the 7 voting trustees the right to alter the ecology essential to the petitioners and their fellow tribal members exercise of their treaty-protected hunting and fishing rights. That Court's decision also bestowed upon the same voting trustees the right to convey tribal lands subject to these treaty rights to non-Menominee without the approval of the tribal members. That Court's decision, accordingly, completely negates the rights which petitioners and their fellow tribal members reserved to themselves in the Termination Plan and which this Court found were preserved in the Termination Act.

The Wisconsin Supreme Court's decision in this case presents petitioners with an anomaly. It recognized petitioners' treaty rights in the affected lands, but in approving the issuance of the permit by the respondents it prohibited the petitioners and their fellow tribal members from exercising those rights on the flooded lands and impaired their exercise of the rights on surrounding lands. Its decision also denied petitioners any right to notice that their treaty rights to hunt and fish these lands might be abolished by action of a state agency. The Wisconsin Supreme Court's conclusion that the 7 voting trustees could sell or so change

[12] See discussion in petition, pp. 11, 14, 15, 17, 18 and 19.

the ecology of all the tribal lands as to abrogate treaty hunting and fishing rights, is completely incompatible with petitioners' rights under the 1854 Treaty of Wolf River and the Menominee Termination Act and Plan as to clearly confer jurisdiction upon this Court to consider the questions presented by this case.

Conclusion

For all of the above reasons, and those cited in this brief based on the petitioners for certiorari in this and the *Tomow* case, petitioners respectfully assert that this Court clearly possesses jurisdiction under Title 28, U.S.C., § 1257 (3) to review this case.

Respectfully submitted,

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